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Can Law and Economics Bring The Funk ... or Efficiency?: A Law and Economics Analysis of Digital Sampling

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CAN LAW AND ECONOMICS BRING THE FUNK ... OR EFFICIENCY?: A LAW AND ECONOMICS ANALYSIS OF DIGITAL SAMPLING

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RYAN C. GRELECKI*

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I. INTRODUCTION

When that first hook from *Ice Ice Baby* comes over the speakers, it is unmistakable for almost an entire generation. Those first few notes (dingdingding duhdah dingding . . .) immediately cause many folks to “stop, collaborate, and listen.”¹ The problem with identifying those sounds with Vanilla Ice is that they were not created by him or his discjockey (DJ), but rather by David Bowie and Queen in their song *Under Pressure*.² The *Ice Ice Baby* versus *Under Pressure* com-

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1. VANILLA ICE, *Ice Ice Baby*, on TO THE EXTREME (Capitol Records 1990).

2. QUEEN, *Under Pressure*, on LIVE MAGIC (Hollywood Records 1986). *Under Pressure* was written as a collaboration by Queen and David Bowie. Vanilla Ice used the sample without permission, Dean Kuipers, *Vanilla Ice Returns Buff but Still Bland; Gangsta Lyrics Aside, the Rapper Needs More Originality to Rise Above His Catchy 1990 Hit*, L.A. TIMES, Sept. 10, 2004, at E23, and lost his royalties to Queen and David Bowie, Ben Chailis, *The Song Remains the Same: A Review of the Legalities of Music Sampling*, Dec. 23, 2003, http://www.mondaq.com/i_article.asp?articleid=23823&print=1.

parison is an example of digital sampling and the confusion it potentially causes.

Artists, typically in the rap and hip-hop genres, often utilize small portions of songs created by other artists. Digital technology provides artists with the ability to simply lift notes from a previously recorded song, modify them (or not), and place them into the background, bass line, or basic beat of a new song. This practice has uncovered a new set of issues within copyright law.

A sound recording is the audible song as performed by an artist. Sound recordings are copyrightable subject matter, with owners—performing artists—having exclusive rights to reproduction and derivative works.³ They are produced based on musical compositions, which include the written notes, words, and arrangements of a song. Musical compositions are copyrightable subject matter, with owners—songwriters/composers—having exclusive rights.⁴ Digital sampling has forced copyright law to specify whether using small portions of a copyrighted musical work infringes on the exclusive rights of the owner(s).

There are three cardinal cases that have dealt with the issue of digital sampling in order to determine the appropriate rights for parties on either side of the sample. These cases run the gamut in regard to solving the issue using three different approaches: (1) calling digital sampling “stealing” and warranting criminal prosecution,⁵ (2) recognizing licenses as circumventing sound recording infringement but applying a substantial similarity analysis to musical composition infringement,⁶ and (3) calling samples “derivative works” and extending restrictions on pirating of whole works to the pirating of samples.⁷

3. 17 U.S.C. §§ 101-102, 114(b) (2000). While copyrights are now attainable in sound recordings, this has not always been true. In 1972, the Sound Recording Act of 1971 took effect, protecting sound recordings. While other tangible creative works, like musical compositions, were protected, sound recordings were vulnerable until the law began to catch up with advances in digital music technology.

4. *Id.* §§ 102, 106.

5. *See* Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183-85, 185 (S.D.N.Y. 1991) (holding that Grand Upright Music owned valid copyrights in the sound recording and musical composition of Gilbert O’Sullivan’s *Alone Again (Naturally)* and that Biz Markie’s unauthorized use of a sample of the song was a “callous disregard for the law”).

6. *See* Newton v. Diamond, 388 F.3d 1189, 1190, 1192-93 (9th Cir. 2004) (holding that the three-note sample used in the Beastie Boys song, *Pass the Mic*, was not a substantial enough portion of the musical composition of James W. Newton’s *Choir* to constitute copyright infringement; since the Beastie Boys had obtained a license to use the sound recording, only the musical composition copyright was at issue), *cert. denied*, 125 S. Ct. 2905 (2005).

7. *See* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004) (holding that owners of rights in sound recording of George Clinton, Jr. and the Funkadelics’ *Get Off Your Ass and Jam* had the exclusive right to sample the sound recording and, as

This confusing legal progression seems to be the result of a judicial desire to provide some stability in a tumultuous music industry. To determine an efficient test or an efficient bright-line rule in regard to the copyright issues created by digital sampling—rather than a quick fix—a law-and-economics analysis provides a great deal of insight. Should compulsory licensing solve the problem? Should licensing and licensing fees be based on bargaining, rather than statutory requirements? Should fines be used to ensure the integrity of a bargaining process? Should digital sampling, without permission or licensing, warrant criminal prosecution? Even though Vanilla Ice claimed “if there was a problem, yo, I’ll solve it,”⁸ perhaps a law-and-economics analysis is more reliable for a music industry practice that is under pressure.

In this Comment, Part II surveys the copyright law concepts involved in digital sampling. Part III details the environment in the music industry as it exists today—including more detailed information on digital sampling, an explanation of compulsory licensing, and a discussion of the leading cases in digital sampling. In addition, Part III differentiates the issues created by digital sampling of sound recordings versus musical compositions. Part IV offers an economic analysis of the digital sampling issue—including analysis of copyright law, digital sampling rules created by the dispositive cases, and potential resolutions for courts facing digital sampling disputes. Part V concludes the Comment.

II. COPYRIGHT LAW: THE PRELUDE

Digital sampling is just one example of a practice that affects the continuously evolving area of copyright law. As technology continues to expand the limits of expressive capabilities, as well as reproduction capabilities, copyright law must adapt in order to adequately protect original works fixed in a tangible medium.⁹

According to the Copyright Act, the law protects “original works of authorship fixed in any tangible medium of expression.”¹⁰ Significant to the music industry, musical works such as accompanying words (musical compositions) and sound recordings are included in the list of “works of authorship.”¹¹ The difference between musical compositions and sound recordings is discussed in Part III.A, *infra*. The

such, a substantial similarity analysis was not required to prove copyright infringement on the part of No Limit Films), *amended by* 401 F.3d 647 (6th Cir. 2004) (granting rehearing en banc on section II of opinion).

8. VANILLA ICE, *supra* note 1.

9. See ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 319 (3d ed. 2003).

10. 17 U.S.C. § 102(a) (2000).

11. *Id.*

Copyright Act affords certain exclusive rights to the owners of a copyright—including the rights to make copies, to prepare derivative works, to control the sale and distribution of the work, to control the sale and distribution of any copies or derivative works, and to control the public performance or display of the work(s).¹²

These exclusive rights are the basis for the litigation that has arisen in the music business regarding digital downloading (copying and distribution) and, critical to this Comment, digital sampling (copying and derivative works). The exclusive rights are also limited by three doctrines that are especially important in the music industry: (1) fair use, (2) first use, and (3) first sale. The fair use doctrine grants the limited use of copyrighted works based on a balancing test. This test looks at the purpose and character of the use of the copyrighted work (must be transformative and noncommercial), the nature of the copyrighted work (more creative works get greater protection), the portion of copyrighted work used, and the effect of the use of the copyrighted work on the market.¹³ Fair use could apply to digital sampling, depending on how a court analyzes sampling under the fair use criteria listed in the statute.¹⁴ In contrast, the first use doctrine, which is particular to the music business, requires the owner of a musical composition copyright to license its use to anyone who wants it;¹⁵ this is also known as the compulsory license, discussed in Part III.B, *infra*. The first sale doctrine permits the owner of a lawfully obtained copy of a work to sell or dispose of the work without the permission of the copyright owner.¹⁶ This plays out in digital sampling when courts must determine whether a sampling artist has infringed on an owner's rights, since a lawfully obtained license to use a sound recording or musical composition permits sampling.

III. THE MUSIC BIZ: *WHAT'S GOIN' ON*

In order to understand why digital sampling and the rules surrounding it are of any concern, one must understand it and the environment in which it exists. Digital sampling, for the purposes of this Comment, is a term taken from the music industry. The music indus-

12. MERGES ET AL., *supra* note 9, at 323-24.

13. 17 U.S.C. § 107 (2000); *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350-51 (S.D.N.Y. 2000).

14. *See* 17 U.S.C. § 107 (2000). Balancing the four fair use factors allows courts to avoid an application of copyright law that would stifle creativity. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 817-18 (9th Cir. 2003) (citing Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1399 (9th Cir. 1997)).

15. 17 U.S.C. § 115(a)(1) (2000).

16. *Id.* § 109(a). This statute is what allows used CD stores and video rental stores to lawfully exist.

try has been shaken up quite a bit lately due to the rise of internet technologies that have made “sharing” music much easier. In addition, recording companies have steadily lost money,¹⁷ forcing company reductions and industry consolidations.¹⁸ The emergence of digital downloading brought about a great deal of litigation centered on the exclusive rights of artists, songwriters, and record companies in copyrighted songs.¹⁹ The details of these cases, while interesting, are not of concern for the purpose of this Comment. It is the impact of these cases that is of much greater importance. The digital download or music piracy (depending on your biases) cases bring critical sound recording and musical composition copyright issues into light. The courts have said that it is illegal to make songs available online without permission.²⁰ In addition, record companies have responded with a digital-age strategy making piracy more difficult and undesirable through tactics like spoofing,²¹ launching campaigns to warn consumers that piracy is stealing, and moving toward authorized online distribution of songs.²²

All of these steps are evidence that the copyright owners and the courts take very seriously the exclusive rights afforded those who create sound recordings and musical compositions. While the technical details of an internet application can possibly change an out-

17. In addition to legal battles involving digital downloading, there has been a steady reduction in CD shipments from 2000 to 2003. See Recording Indus. Assoc. of Am., 2003 Yearend Statistics, available at <http://www.riaa.com/news/newsletter/pdf/2003yearEnd.pdf> (last visited Jun. 15, 2005); RIAA Announces 2003 Year-End Shipment Numbers, (Mar. 4, 2004), available at <http://www.riaa.com/news/newsletter/030404.asp>. Coincidentally, or not, the decline in sales began the same year that Napster came online.

18. The disruption in the music business has also caused massive layoffs by major labels. See, e.g., Ethan Smith, *Universal Music to Cut Work Force as Industry Sags*, WALL ST. J., Oct. 16, 2003, at A3; *Sony Music to Cut 1,000 Jobs as Part of a Vast Restructuring*, WALL ST. J., Mar. 28, 2003, at B2. It has also caused the merger of two labels, Sony and BMG. See *U.S. Agency Clears Sony-BMG Music Merger*, N.Y. TIMES, July 29, 2004, at C5.

19. The music business has been plagued with issues related to the illegal use or distribution of songs. Digital downloading/music piracy was brought into question in several cases. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004); *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d (S.D.N.Y. 2000). These cases have hinged upon the alleged infringer's contribution to third-party infringement and their ability to supervise and prohibit the activity of the third-party infringers.

20. The courts in *A&M Records* and *UMG Recordings* found the providers to have infringed on the copyrights of the recording companies. By contrast, the Ninth Circuit did not find that Grokster had the requisite knowledge of or control over third-party infringement to constitute vicarious or contributory infringement. *Grokster*, 380 F.3d at 1163. However, the United States Supreme Court vacated and remanded the Ninth Circuit's decision based on evidence of Grokster's active inducement of third-party infringement.

21. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 375 (5th ed. 2003). Record companies will loop a small portion of a popular song, download it, and then post thousands of copies of this looped version so that downloaders end up with it rather than the real recording. This practice is known as spoofing. *Id.*

22. See *id.* at 376.

come,²³ the basic idea is that songs cannot be distributed without permission. The question that digital sampling raises is, What about small portions of a song distributed in a completely new copyrightable work?

A. Sound Recordings v. Musical Compositions

When dealing with copyright issues in the music business, the distinction between a sound recording and a musical composition must be understood. A sound recording is the actual recorded version of a song; it is the artist's individual expression of a song through instruments and voice.²⁴ A musical composition, on the other hand, includes the notes, arrangement (sheet music), and lyrics of a song.²⁵ Given that these are two distinct facets of an original musical work, there are different copyright protections for each.

Prior to 1972 and the enactment of the Sound Recording Act of 1971, sound recordings received no copyright protection.²⁶ The protections now afforded to sound recordings relate to the artist's individual expression in the song performance. Owners of sound recording copyrights cannot prevent others from recording the same song but can prevent the copying and distribution of their original recording.²⁷

Under copyright law, musical compositions have always been considered musical works and protected in the same way as a play or short story.²⁸ Copyright law prohibits others from copying and using the lyrics or the sheet music of a song in any way. Given this broad range of protection for musical compositions, they are subject to compulsory licensing.²⁹ The compulsory license forces the musical composition copyright holder to allow anyone to use the work as long as he or she pays for it.³⁰ There is a statutory cap on the fee for the use, which can be and is often negotiated down. There is no such compulsory license for sound recordings.³¹ As discussed in Part III.D, *infra*, the courts have had to deal with both of the different copyrights in determining how digital sampling does or does not infringe on a copyright owner's exclusive rights.

23. Napster technology actually included a Napster-owned server, housing all the copyrighted works, while Grokster technology did not rely on a central server to store songs for download. *See Napster*, 239 F.3d at 1012; *Grokster*, 380 F.3d at 1158.

24. *See MERGES ET AL.*, *supra* note 9, at 371.

25. *See id.*

26. *Id.* at 372.

27. *Id.*

28. *Id.* at 371.

29. *Id.*

30. *Id.*

31. *Id.*

B. The Compulsory License: What, Why, and How Much?

As discussed in Part III.A, *supra*, the compulsory license is an exception to the exclusive rights of a musical composition copyright holder. There are several kinds of compulsory licenses, but for the purposes of this Comment, we are only concerned with the compulsory license in phonorecords³² of nondramatic musical compositions.³³

The compulsory license in phonorecords of nondramatic musical compositions is known as a compulsory mechanical license in the music industry.³⁴ As mentioned in Part III.A, *supra*, compulsory mechanical licenses only apply to musical compositions. Based on section 115 of the Copyright Act, once a song has been recorded, whoever owns the copyright is required to license it to whomever else wants to use it in a phonorecord, as long as the new user pays a capped statutory fee.³⁵ In order to obtain a compulsory license, the song must be (1) a nondramatic musical work, (2) previously recorded, (3) distributed publicly in phonorecords, and (4) for use only in phonorecords.³⁶

Congress created the compulsory mechanical license to prevent the music industry from establishing a monopoly on musical works.³⁷ In addition, to control the fee for the compulsory mechanical license, Congress created the statutory rate. The rate establishes a cap for the fee charged by copyright owners for the use of their musical composition. As of January 1, 2006, the rate is 9.1 cents for a song five minutes long or shorter, with a rate of 1.75 cents per minute or fraction of a minute above five minutes.³⁸

32. The Copyright Act defines phonorecords as:

[M]aterial objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device . . . "phonorecords" includes the material object in which the sounds are first fixed.

17 U.S.C. § 101 (2000).

33. *See id.* § 115.

34. PASSMAN, *supra* note 21, at 197-98.

35. *Id.*

36. *Id.* at 198.

37. *Id.* at 197.

38. *Id.* at 199. For example, if an artist purchases the license to use a particular musical composition, every time a CD with a song using that copyrighted composition is made (not just sold, but made), the owner of the copyright gets paid. The owner gets 9.1 cents per CD if the song is five minutes or shorter. If the song is even a fraction over five minutes, the copyright owner gets an additional 1.75 cents (10.85 cents total) per CD. If the song is a fraction over six minutes, the copyright owner gets the 9.1 cents, plus the 1.75 cents for the additional minute, plus another 1.75 cents for the fraction over six minutes (12.6 cents total) per CD. Obviously, this adds up if a songwriter has multiple copyrighted songs on an artist's album and that album is reproduced millions of times.

C. Digital Sampling: What, Why, and How?

Sampling traces its roots back to Jamaica in the 1960s when artists or DJs would “dub” records by mixing different reggae albums together, over which the artists would improvise lyrics.³⁹ DJ Kool Herc, held by many as the grandfather of rap,⁴⁰ brought “dub” to the Bronx, New York, from Jamaica in the 1970s.⁴¹ As local artists in New York began to mix disco, funk, and R&B records via turntables to create the background for their street lyrics, rap was born.⁴² In the mid-1980s, digital musical technology came onto the scene.

With the advent of the digital sampler, artists were able to make perfect digital copies of any sound or song they liked and then play or edit it through some other instrument or device. Entire sections of an existing sound recording could be extended or looped and placed into new songs to create beats and backgrounds without the use of turntables and mixers.⁴³ This practice has become very common in rap and hip-hop. In addition to the example from the Introduction, songs like Sugar Hill Gang’s *Rapper’s Delight*, M.C. Hammer’s *You Can’t Touch This*, and 2Pac’s *Changes* are examples of popular songs that have sampled other previously recorded popular songs.⁴⁴

Although a few artists were concerned about the possibility of infringements at the onset, sampling went on without much concern, for the most part, for the rights of the owners of the sampled recording, and deals were struck only if artists were actually caught having sampled another’s work.⁴⁵ The deals typically involved buying out the rights in the sampled sound recording owned by a record company and those rights in the musical composition owned by a publisher.⁴⁶ The relaxed attitude toward sampling ended with the words of the Honorable Kevin Thomas Duffy, “Thou shalt not steal.”⁴⁷

Digital sampling is obviously not practiced without reason. First, given the technology, it is easy to do. Sound recordings can be repro-

39. See Eric Shimanoff, *The Odd Couple: Postmodern Culture and Copyright Law*, 11 MEDIA L. & POL’Y 12, 24-25 (2002).

40. Garage-Music.com, Reggae Music—What Does It Mean to House and Garage Music, <http://www.garage-music.com/reggae.html> (last visited Feb. 21, 2006).

41. See Shimanoff, *supra* note 39, at 24-25.

42. See *id.* at 25.

43. See *id.* at 26-27.

44. *Rapper’s Delight* samples the disco hit *Good Times* by Chic. *Id.* at 25. *You Can’t Touch This* samples the funk hit *Super Freak* by Rick James. *Id.* at 28. *Changes* samples the 1980s hit *The Way It Is* by Bruce Hornsby and the Range. Keith Harris, Rap in Peace, <http://citypages.com/databank/21/998/article8376.asp> (last visited Feb. 21, 2006).

45. *Id.* at 27.

46. *Id.*

47. Grand Upright Music Ltd. v. Warner Bros. Records Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

duced as replays, which eliminate some of the copyright mess⁴⁸ but require someone to actually play an instrument in the exact same way to recreate the desired sound. Second, sampling can be profitable. Creating replays costs money and takes time, but sampling can be done for free (absent some of the issues discussed in this Comment) and take seconds. Most importantly, those who sample do so with the idea that the sampled material in the background will make their song better, resulting in greater popularity and higher sales.⁴⁹

D. What Noise Have the Courts Brought?

There are three cases that define the landscape for digital sampling law. *Grand Upright Music, Ltd. v. Warner Bros. Records* involved a sample taken by the rapper Biz Markie without obtaining any permission.⁵⁰ *Newton v. Diamond* involved a dispute over whether a sample taken by the rap group the Beastie Boys infringed upon another artist's musical composition rights.⁵¹ In that case, the Beastie Boys had obtained a license to use the sound recording but not the musical composition.⁵² *Bridgeport Music, Inc. v. Dimension Films* involved a sample used in a song on a motion picture soundtrack.⁵³ Due to an agreement with the original owners of the musical composition, No Limit Films had a license to use it.⁵⁴ As such, the copyright in the sound recording was at the center of the infringement action against the motion picture producer. Each of these cases touch on a different digital sampling scenario—no permission, permission to use the sound recording but not the musical composition, and permission to use the musical composition but not the sound recording—and therefore, produce a different rule of law.

1. Biz Markie

Grand Upright Music, the first major sampling case, was decided in 1991. Biz Markie had used three words and a portion of the music from the original recording of *Alone Again (Naturally)* by Gilbert O'Sullivan.⁵⁵ In an action to obtain a preliminary injunction against the defendants preventing the unlicensed use of the composition and

48. A replay eliminates the need to license the sound recording since the artists will be recreating their own sound recording, but it still requires a license of the musical composition since the song writer's notes and arrangement are used. See PASSMAN, *supra* note 21, at 296.

49. See *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004); *Grand Upright Music*, 780 F. Supp. at 185.

50. 780 F. Supp. at 184-85.

51. 388 F.3d 1189, 1190 (9th Cir. 2004).

52. *Id.*

53. 383 F.3d at 393.

54. *Id.*

55. *Grand Upright Music*, 780 F. Supp. at 183.

sound recording, the federal court in the Southern District of New York saw only one issue: to determine the owner of the copyright in the song written by Gilbert O'Sullivan and the master sound recording made by Gilbert O'Sullivan.⁵⁶

While the plaintiff was not the artist, the court determined Grand Upright Music, Ltd. to be the owner of the copyrights to the musical composition and the original sound recording. The determination of ownership was based on a deed transferring the copyrights to the plaintiff, testimony by the original artist that the plaintiff was the owner, and by evidence that the defendant had contacted the plaintiff in an attempt to obtain a license from the plaintiff before and after the album was released.⁵⁷

The court went on to say that the actionable infringement was not that Biz Markie used the samples in his recordings, but that his record company distributed those materials without the proper permission to use the samples.⁵⁸ The court also rejected the defendant's argument that others in the rap music business participated in illegal sampling as "totally specious."⁵⁹ Not stopping there, the court stated:

[I]t is clear that the defendants knew that they were violating the plaintiff's rights as well as the rights of others. Their only aim was to sell thousands upon thousands of records. This callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures.⁶⁰

After opening his opinion with "Thou shalt not steal," District Judge Kevin Thomas Duffy ended his opinion by suggesting criminal penalties for the defendant's use of digital sampling in this case.

Grand Upright Music created a bright-line rule for digital sampling: If there is no permission, digital sampling infringes and is perhaps even criminal. The cases that would follow required a bit more evaluation on the part of the court to determine where to draw the line between permissible and infringing sampling.

2. *Beastie Boys*

In 2004, *Newton v. Diamond* was decided over a decade after *Grand Upright Music*. The Beastie Boys had sampled a six-second, three-note sequence from jazz flutist James W. Newton's *Choir* in

56. *Id.*

57. *Id.* at 183-84.

58. *Id.* at 185.

59. *Id.* at 141 n.2.

60. *Id.*

their song *Pass the Mic*.⁶¹ While the Beastie Boys had obtained a license to use the sound recording, they had not obtained a license to use the musical composition.⁶² The court identified the issue as “whether the incorporation of a short segment of a musical recording into a new musical recording, i.e., the practice of ‘sampling,’ requires a license to use both the performance and the composition of the original recording.”⁶³

The Ninth Circuit affirmed the decision of the district court in holding that the Beastie Boys’ use of the musical composition was *de minimis*.⁶⁴ The court essentially established the use of a *de minimis* test to determine copyright infringement in musical composition sampling cases. To establish an action for infringement, the use must be significant, substantial,⁶⁵ and recognizable by an average audience.⁶⁶ The court went on to say the case dealt with fragmented literal similarity.⁶⁷

This *de minimis* analysis requires the sample to be a quantitatively and qualitatively significant portion of the entire original composition for establishment of infringement.⁶⁸ Since the sampled three-note portion of the musical composition appeared only once, accounting for six seconds of a four-and-a-half-minute song, it was not quantitatively significant.⁶⁹ In addition, based on expert testimony, the sampled portion did not constitute the “hook” of the composition, which made it qualitatively insignificant as well.⁷⁰ Newton offered no evidence beyond his own unique method of playing, which was not indicated on the score, to rebut the testimony of the Beastie Boys’ experts.⁷¹ While Newton had a copyright interest in the musical composition of *Choir*, the Beastie Boys’ use of “three notes separated by a half-step over a background C note” was not infringement.⁷²

The rule established in *Newton* was nowhere near as bright as that in *Grand Upright Music*. *Newton* requires courts to examine the

61. *Newton v. Diamond*, 388 F.3d 1189, 1190 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2905 (2005).

62. *Id.*

63. *Id.*

64. *Id.* at 1192, 1196-97.

65. *Id.* at 1192-93.

66. *Id.* at 1193 (citing *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986) and the substantial similarity test).

67. *Id.* at 1195.

68. *Id.*

69. *Id.* at 1195-96.

70. *Id.* at 1196.

71. *Id.* What prevented Newton’s unique performance technique from becoming a factor was that it was not fixed in a tangible medium. While Newton and his expert claimed that how he played the flute and the sound he produced made the composition copyrightable, the sound recording was not at issue and the technique used was not written on the composition itself. *Id.* at 1194.

72. *Id.* at 1196.

intricacies of samples and determine their significance and similarity to the protected musical compositions from which they come. This in-depth *de minimis* analysis calls for expert testimony as well as “average audience” and substantial similarity determinations. In addition, *Newton* puts the onus on composers to include everything they contribute to a sound recording in the composition in order to protect more than just the sound created. With all that *Grand Upright Music* and *Newton* added to digital sampling law, they did not provide for the scenario of authorized use of a musical composition paired with unauthorized use of a sound recording.

3. *No Limit*

Mere months after *Newton*, the Sixth Circuit was faced with the remaining digital sampling scenario—where the sampling party has a valid license to the musical composition but not to the sound recording of the sampled work—in *Bridgeport Music, Inc. v. Dimension Films*. No Limit Films released a soundtrack to the movie *I Got the Hook Up*, which included a rap song *100 Miles and Runnin*.⁷³ The song included a sample from *Get Off Your Ass and Jam* by George Clinton, Jr. and the Funkadelics.⁷⁴ Bridgeport Music owned the copyrights to both the sound recording and the musical composition of *Get Off Your Ass and Jam* and brought infringement actions for both.⁷⁵ Due to a sample use license agreement between Bridgeport Music and the original owners of the composition for *100 Miles and Runnin*, the musical composition infringement action was barred.⁷⁶

Facing only the issue of whether the admitted digital sampling of the *Get Off Your Ass and Jam* sound recording constituted infringement, the appellate court reversed the district court and threw out the substantial similarity and *de minimis* analyses.⁷⁷ The court held that the analysis used to determine infringement of a musical composition is not the same as that used to determine infringement of a sound recording.⁷⁸

Based on section 114(b) of the Copyright Act, the court held that sampling constitutes a derivative work and, as such, is an exclusive

73. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 393 (6th Cir. 2004).

74. *Id.*

75. *Id.*

76. *Id.* at 393-94. This agreement granted the sample use license in the *Get Off Your Ass and Jam* composition to the owners of the *100 Miles and Runnin* composition, as well as to their licensees. *Id.* No Limit Films was granted an oral synchronization license to use *100 Miles and Runnin* on the *I GOT THE HOOK UP* soundtrack, making it a licensee of the owners of the composition and licensed to use the *Get Off Your Ass and Jam* composition. *Id.*

77. *Id.* at 395.

78. *Id.* at 396.

right of the copyright owner.⁷⁹ The court gave three reasons as to why sampling should be considered derivative and exclusive: (1) the ease of enforcement, (2) the market's capability of controlling license fees, and (3) because sampling is never accidental.⁸⁰ The court differentiated this situation from that of sampling a musical composition by stating that the difference is mandated by statute and that even a small portion of a sound recording is of value.⁸¹ The sounds are the original work of the copyright owner in a sound recording, and when they are lifted in a sample, it is a "physical taking" from the owner's chosen fixed medium.⁸²

The Sixth Circuit recognized that it was creating a new rule in digital sampling law and offered further justifications. The court stated that its interpretation had scholarly support and was not "out of thin air."⁸³ The court noted that a significant number of artists and record companies have decided to obtain licenses when sampling the works of others.⁸⁴ In addition, the recording industry has the knowledge and means to establish sampling licensing guidelines and fees.⁸⁵ The court also recognized that its interpretation was based on a literal reading of the appropriate statute and that the recording industry has sufficient ability to go to Congress and have the statute changed if they are not fond of the court's application.⁸⁶ Ultimately, *Bridgeport Music* created another bright-line rule in digital sampling: If you sample a sound recording, you must pay for it or it is infringement.

IV. LAW AND ECONOMICS: BRINGIN' THE FUNK . . . OR THE EFFICIENCY?

Just as there are costs and benefits to particular actions taken by individuals, there are also costs and benefits to particular rules of law. It follows logically that, just as with individualized actions, laws should be established or enforced where the cost of enforcing a law is equal to the benefit of enforcing that law. The balancing of costs and benefits in order to achieve efficient outcomes is the foundation of

79. *Id.* at 398.

80. *Id.* at 398-99. In regard to the ease of enforcement, the court stated that it is as simple as "[g]et a license or do not sample," especially since artists are permitted to make replays and duplicate sounds from other recordings. As to market price control, the court stated that a copyright holder could not demand a price that was higher than the cost to duplicate the desired sound. As for sampling never being accidental, the court stated that sampling a sound recording is knowingly taking someone else's work. *Id.*

81. *Id.* at 399. A sample can save, cost, or add something new to a song. *Id.*

82. *Id.*

83. *Id.* at 400.

84. *Id.* at 401.

85. *Id.*

86. *Id.* at 401-02.

economic analysis. Law and economics is the discipline that brings economic analysis to the legal arena. It is a tool for analyzing the costs and benefits of instituting particular rules, establishing particular rights, and enforcing particular punishments for the purpose of determining an efficient legal outcome.

The basic assumption of economic analysis is that people act rationally. In extrapolating that to the law, the assumption is that courts and lawmakers act rationally and that the music industry will react rationally to the decisions of the courts and the lawmakers. The problem is that when courts decide cases, it is typically the *rationality* of one person or as many as nine individuals that determines the rule for everyone else. In addition, when Congress acts by passing statutory law, it is a *representative* group creating laws for everyone else. As such, the statutory and case law are subject to a law-and-economics analysis for the purpose of measuring their practical—applying to those actually affected by the law—efficiency.⁸⁷

A. *Intellectual Property & Copyright Law, Generally*

As we have seen, digital sampling is all about copyright law and the exclusive rights and protections under that law. More broadly, digital sampling falls under the intellectual property umbrella. In order to understand what economic thinking has to offer digital sampling, one must understand what the discipline says about intellectual property and copyright law in general.

1. *Intellectual Property*

Intellectual property almost defines itself. It is the area of law that identifies the ownership rights of ideas or the expression of those ideas. There are different areas of intellectual property, including patents, trademarks, trade secrets, and copyrights. While, for the purposes of this Comment, we are concerned only with copyrights, observations can be made from an economic analysis of intellectual property in general.

Property is divided into real and personal property. Intellectual property falls into the category of personal property as it is the idea or expression of a particular person or persons. The peculiarity in defining intellectual property as real or personal is that, unlike either

87. “Legal rules are to be judged by the structure of incentives they establish and the consequences of people altering their behavior in response to those incentives.” DAVID D. FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 11 (2000).

of the two, intellectual property is not scarce.⁸⁸ An item is not scarce if one person's use of that item does not prevent others from using or obtaining the item or an exact copy of it. For example, listeners cannot use up a song in such a way that it disappears like a tree or a piece of clothing. Despite this oddity, intellectual property is personal property of the author or rightful owner, and it deserves protection.

The question for law and economics then becomes: Is it efficient to protect intellectual property as private personal property, or should it be open for all to use freely upon creation? Intellectual property is just that—intellectual. It is the product of one's mind, a unique idea or expression of an individual. If such property is made available to any and all upon creation, there is no incentive for creators to create. For example, if songwriters cannot profit from their ability to pen that platinum ballad, they are less likely to even put the pen to paper. Even the pride of being known as a creator or inventor is weakened as an incentive; it no longer matters who did the legwork because anyone can have or use the product created. On the other side of that argument is the idea that granting exclusive property rights in intellectual property creates monopoly-like circumstances. This is inefficient from the perspective that society benefits from new ideas and expressions. For example, if songwriters are not forced to license their compositions to artists, it is possible that no one will ever hear those words and notes performed. Under another and perhaps more important example, if pharmaceutical companies have uninhibited exclusive rights to their drugs, they can prevent the production of lower-cost generic drugs and even the development of new related drugs.⁸⁹

While private ownership can serve as a means to avoid the commons problem (free riders),⁹⁰ private ownership can result in an anti-commons problem (holdouts),⁹¹ as indicated by the simple examples above. Given appropriate intellectual property laws, however, the

88. See Daniel R. Cahoy, *Changing the Rules in the Middle of the Game: How the Prospective Application of Judicial Decisions Related to Intellectual Property Can Promote Economic Efficiency*, 41 AM. BUS. L.J. 1, 8 (2003).

89. Pharmaceuticals are afforded patent protection, which lasts only twenty years. 35 U.S.C. § 154(a)(2). The length of many pharmaceutical patents is often limited by such things as required FDA testing. Posting of Gary Becker to The Becker-Posner Blog, <http://www.becker-posner-blog.com/archives/2004/12/pharmaceutical.html> (Dec. 12, 2004, 20:42 EST).

90. When property is held in common, the risk arises that an individual user will take full use of the property without regard for another's use and without paying for the use. Relying on the fact that others will continue to pay to maintain the property and pick up slack, the renegade user gets a free ride.

91. When property is held privately, an individual owner can prevent the transfer of the use of that property to society for higher and better use. If several private property owners have something from which society can benefit, one individual can hold out for a higher price, relying on the knowledge that his or her property is essential and that society will be forced to pay what he or she demands.

market will be able to determine the price society is willing to pay for new ideas and expressions. Given this, the courts and Congress have created specific rules surrounding the rights granted to those who create and invent specific kinds of intellectual property. There are different rules—and different resulting rights—for patents, trademarks, trade secrets, and copyrights. This Comment focuses solely on the exclusive rights established by copyright law.

2. *Copyrights*

The basic tenets of copyright law necessary for the discussions in this Comment were discussed in Part III.A. In review, the Copyright Act grants certain exclusive rights to copyright owners—including the rights to make copies, prepare derivative works, control sale and distribution of the work, control sale and distribution of any copies or derivative works, and control the public performance or display of the work.⁹² Even though this seems to be all anyone might want to do with a copyright, thus establishing a creative monopoly, copyright law only protects the expressions of ideas and not the ideas themselves. These exclusive rights also create only limited monopolies as they have durational limits.⁹³ In addition, each of these rights can be transferred and licensed separately or all together.⁹⁴ In dealing with most copyrights, including those involved in digital sampling, copyright owners must register their copyrights in order to bring infringement suits.⁹⁵ The Copyright Act places other limits and restrictions on the exclusive rights of copyright owners that are beyond the scope of this Comment.⁹⁶

The nature of the copyright appears to have some blackletter efficiency. As the statutes are written, the owners are given the sole opportunity for exploitation of their creations; however, it does not last forever, is surmountable, and is open to market influences. While the unintended consequence of granting exclusive property rights tends to be holdouts, the various limitations on exclusive rights give efficiency a chance. For example, if I were to write a blockbuster caliber manuscript about the potential dangers of taking that high-paying, large-corporate, law firm associate position right out of law school—and assuming no legal issues with John Grisham—I would have an exclusive copyright in that literary work. I would also have an exclusive right in any derivative works made from that script, including a motion picture adaptation. While copyright law gives me the ability

92. 17 U.S.C. § 106 (2000).

93. *See id.* §§ 301-305.

94. *See id.* §§ 201-205.

95. *See id.* § 411.

96. *See id.* §§ 107-122.

to monopolize the exploitation of my masterpiece, it cannot become a blockbuster unless I sell it—transfer the copyright—to a movie studio to make the film. It becomes economically more efficient—basically, more lucrative—for me to relax my white-knuckled grip on the copyright so I can see my work come to life on the big screen and get my date with Oscar. Granted, I may not have the bargaining power of a major motion picture studio to demand some outrageous price, but the sum would most likely be worth more money than what a copy of my manuscript is worth. However, if my product is of blockbuster caliber, I can shop it around to several studios and let the market for blockbuster scripts drive up my price. Regardless, the limited nature and flexibility of the rights granted by copyright law promote efficient use and distribution of the creative expression of ideas. How efficient those laws are depends upon a court's application of those laws, subject to its own cost-benefit analysis.⁹⁷

B. Copyrights in the Music Biz

Copyrights in the music industry offer exploitation opportunities similar to that described in Part IV.A.2, *supra*. If songwriters create platinum ballads, it makes no sense economically for them to monopolize their uses. Instead, songwriters want an artist to use the ballad because that is how they get paid. As such, songwriters can put their work into the musical composition market and, rather than demanding the highest bidder, be forced to compete with other songwriters to have the best—or most popular and most appropriate—artist perform their songs. Allowing those composition copyrights to be used by others is very lucrative. There is also money, albeit not as much as that afforded to a songwriter, to be made in performing that platinum ballad. Artists need songwriters, and songwriters need artists. It is the limited-monopoly-creating copyright law that allows each to exploit the same work efficiently.

In the music industry, copyrights in songs come in two parts: the sound recording and the musical composition.⁹⁸ Most folks have figured out that keeping these copyrights to themselves is not the most financially sound decision. Artists transfer the rights in their sound recordings to their record company so that CDs can be pressed, packaged, promoted, and distributed in a magnitude that the artist individually could never match. Composers or songwriters do not typically transfer the rights to their songs, but instead they license the use of their compositions to artists and record companies, through

97. For a discussion of digital sampling case law, see *infra* Part IV.C.

98. For a discussion of the differences between a sound recording and a musical composition, see *supra* Part III.A.

publishers, to create sound recordings.⁹⁹ Obviously, things get a bit more complex—or more simplistic, depending on your perspective—when the artists performing the songs are also the ones writing the songs or if only one or two members of a band write the songs, while all members perform those songs. Those details are not essential to the purpose of this Comment. Regardless, in dealing with sound recordings and musical composition copyrights, it is all about the economics—or the Benjamins.¹⁰⁰

Money from sound recording and musical composition copyrights is made in royalties. Royalties are the monies paid to an artist or a songwriter for the sale or use of their copyrighted work.¹⁰¹ Royalties are the means through which the music business seeks to make copyright law economically efficient for the parties involved in record deals; they are the transfer price of exclusive rights. Even though the market determines the transfer price for sound recordings and musical compositions, the music industry is not the best example of a perfectly efficient market. There are basically four major labels—with almost all small labels being owned by the majors—with immense amounts of bargaining power.¹⁰² Artists and songwriters rarely have equal bargaining power.¹⁰³ Even when they achieve platinum caliber, that power is limited.¹⁰⁴ Until artists and songwriters achieve “superstar” status,¹⁰⁵ they face a take-it-or-leave-it attitude from record companies. These conditions do not result in the highest valued work obtaining the highest possible price. The benefit a record company may receive from a sound recording can far outweigh the cost it spends to get it, while the benefit to the artist or songwriter may not cover the cost of living.

In such a one-sided market, artists are susceptible to ex post facto opportunism. For example, a record company can sign a band to a multi-album deal that should span seven to eight years and simply drop the band after one or two albums because the band has not recouped.¹⁰⁶ However, this environment eliminates the fear of monopoly

99. See PASSMAN, *supra* note 21, at 69, 239.

100. “Benjamins” is a hip-hop slang term for money. It is a reference to the fact that Benjamin Franklin is pictured on the one-hundred dollar bill.

101. PASSMAN, *supra* note 21, at 69.

102. See *id.* at 64; *U.S. Agency Clears Sony-BMG Music Merger*, *supra* note 18.

103. See PASSMAN, *supra* note 21, at 86-88; Risa C. Letowsky, Note, *Broke or Exploited: The Real Reason Behind Artist Bankruptcies*, 20 CARDOZO ARTS & ENT. L.J. 625, 626 (2002).

104. PASSMAN, *supra* note 21, at 88.

105. *Id.* at 87 (defining a superstar as an artist with “[s]ales from 2,500,000 into the stratosphere”).

106. *Id.* at 100. Recoupment refers to “[t]he process of keeping money to recover an advance . . .” *Id.* at 80. An advance is money paid to an artist before an album is recorded or sold. *Id.* To get this money back, or to recoup an advance, record companies keep artist royalties until the advanced sum is refunded. *Id.*

creation by copyright owners. The structure of the music business simply will not allow rampant holdouts. An artist's unique creation or expression is treated more like a commodity. As it is obvious from the number of bands playing small venues in any town, the number of artists that actually obtain "superstar" status is extremely small compared to the number of artists who are shopping demos. Economic analysis prefers the private property system to avoid the commons problem, leaving the door open to the anticommons problem. The music business has created a market where artists can have privately owned copyrights, but if they hold out, the market leaves them behind. This seems to be very efficient; there are more than enough artists to produce desirable goods, but the record companies, while limiting the monopoly power of those artists, control that flow to market based on music demand.

Also present in this environment is the compulsory license. As mentioned in Part III.B, *supra*, compulsory licenses only exist for musical compositions, and they force owners of copyrights in musical compositions to license their works for use by others if certain criteria are met. This practice is also an efficient control on the monopoly power of songwriters; they are not the gatekeepers of their creative work. Additionally, it is an efficient incentive to promote the creativity of songwriters; their work cannot be exploited without first paying a licensing fee, via royalties. Even though the monopoly power is limited, the fee would seem to create another holdout, anticommons problem; however, the compulsory license statute actually sets a cap on the fee.¹⁰⁷ This should solve the anticommons problem in musical composition licensing. Not surprisingly though, record companies flex their muscles and strike deals with songwriters to avoid paying the statutory maximum price for compulsory licenses or even for all songs licensed on an album.¹⁰⁸ As such, efficiency concerns again arise with the extreme bargaining power of the record companies. This too—like the power of record companies over artists—seems to be very efficient because, given a statutory cap, there would be no bargaining in the musical composition market if the record companies did not strike these deals. Songwriters would and should demand the cap since it is the record company that is coming to them to get permission to use the composition. The influence of the record companies prevents songwriters from settling on a take-it-or-leave-it approach.

After determining who the copyright owners are and who gets paid what in musical composition and sound recording royalties, other issues, like digital sampling, arise. After a song is recorded, it

107. See 37 C.F.R. § 255 (2004).

108. PASSMAN, *supra* note 21, at 210-18.

is possible that another artist, typically in the hip-hop or rap genres, will want to use a small portion of the song in a new work he or she is creating. The industry has evolved to establish sampling licenses in these circumstances. Sampling artists pay the owner of the sampled work for the use, either by some royalty schedule or by a flat fee. As will be seen in Part IV.C, potential disputes arise as to when a license must be acquired and what a license allows.

While digital sampling is not the procurement and exploitation of an entire work, it does raise copyright issues. If copyright owners alone are permitted to sample, the monopoly concern again surfaces; however, allowing a sampling artist to have free reign on any and all previously recorded musical works implicates weakened copyright protections. Ultimately, law-and-economics analysis focuses on the trade-offs that define the digital sampling issue. If copyrights create pure private property ownership rights in sound recordings and musical compositions, original works are fully protected but the creative works of another may be inhibited. For example, without the use of digital sampling, *Ice Ice Baby* and *U Can't Touch This* may not have been so easily and indelibly imprinted in the minds of millions. Other artists would not have sought to use digital sampling to create new works that they would hope would be as unforgettable. On the other hand, perhaps allowing unrestrained digital sampling inhibits original artists. *Under Pressure* and *Super Freak* were very popular songs, written and performed by legendary entertainers. Others of the same talent and renown may be less likely to create original works for fear that the songs, or a portion of them, could be used in some rap or hip-hop song in the future. Either way, copyright law seems to have a stifling effect on artists in the area of digital sampling.

C. *The Case Law*

The three cases discussed in Part III.D, *supra*, lay out three separate rules of law as applied to three different scenarios involving digital sampling. As such, there are three different economic analyses required in order to establish law-and-economics solutions for digital sampling issues.

1. *The Line Is Bright in Grand Upright*

In *Grand Upright Music*, the court held that when the sampling artist does not have permission to use the copyrighted work of another, it qualifies as infringement, and the artist should be subject to criminal penalties.¹⁰⁹ Biz Markie did not have permission to use ei-

109. *Grand Upright Music Ltd. V. Warner Bros. Records, Inc.*, 780 F. Supp. 182.

ther the sound recording or the musical composition in question; however, Biz Markie and the other defendants did attempt to acquire a requisite license from the plaintiffs.¹¹⁰ Regardless, the infringing use, or release of the song containing the sample, occurred before permission was granted and even after consent was denied.¹¹¹ It was the outright disregard for the plaintiff's exclusive rights that motivated the court's decision.¹¹² The court's decision established a bright-line rule for digital sampling cases—digital sampling without permission is infringement with potential criminal prosecution.¹¹³

The establishment of a bright-line rule in digital sampling copyright law allows for greater judicial efficiency. When a particular element is present, there is a particular result. Based on *Grand Upright Music*, when consent to use a sample of a copyrighted song is not obtained, the defendant is liable for copyright infringement. Judges do not have to apply a balancing test or a substantial similarity analysis like the court did in *Newton v. Diamond*. It creates a hard-and-fast rule that allows judges to ignore creative considerations, resulting in speedier and more predictable litigation.

This seemingly efficient rule is not without unintended consequences. Copyright law is meant to foster creativity by protecting creative works. While the bright-line rule in *Grand Upright Music* protects the creative works of one artist, that same protection stifles the creativity of another artist. While enforcing copyright exclusivity, this rule applied by default actually extends the protection available under copyright law. Refusing to consider the creative aspects of an unauthorized use of a copyrighted work ignores the fact that the Copyright Act placed limitations upon the owners' exclusive rights.¹¹⁴

Limitations were placed on copyrights in sound recordings and musical compositions.¹¹⁵ The limitations placed on sound recordings deal mostly with public performance rights; however, a major limitation placed on musical compositions is the compulsory license. The compulsory license existed when *Grand Upright Music* was decided; so if the rule established by that court is applied to digital sampling, it ignores this statutorily created right of an artist to use a musical composition. This inconsistency transforms what seems to be judicial efficiency from one perspective into judicial supremacy.¹¹⁶

110. *Id.* at 184-85.

111. *Id.*

112. *Id.*

113. *Id.* at 185.

114. 17 U.S.C. §§ 107-122 (2000).

115. Section 114 of the Copyright Act establishes the scope of exclusive rights in sound recordings, and section 115 does the same for musical compositions. 17 U.S.C. §§ 114-115 (2000).

116. It is generally accepted that the legislature creates laws, representing the views and opinions of constituents and lobbying members of various industries. It is also gener-

Grand Upright Music also serves to establish a kind of *ex ante* punishment. The bright-line rule sends the message to potential samplers that if they use portions of another artist's sound recording or musical composition without the requisite licenses, they are liable for infringement and could face criminal prosecution, regardless of the extent or nature of the use. In an attempt to prevent copyright infringement, the court has said digital sampling without permission is never permitted. Unauthorized sampling artists know before they act that they will be punished.

While this level of deterrence seems to uphold the principles of protection in the Copyright Act, it opens the door to an unintended consequence of *ex post facto* opportunism. For example, assume an artist wants to sample a song, and he or she obtains permission from the owner of the sampled work because he or she is aware of the potential punishment for failure to obtain permission. After agreeing to pay for the use and after the new work is created and released, the sampling artist then refuses to pay the licensing fee. This requires the copyright owner to seek an injunction and to file a breach of contract action; it requires the owner to bear some of that licensing cost through the expenditure of legal fees. As a result, the chance for settlement also arises, which could potentially benefit the sampling artist. While this *ex post* opportunism could be prevented by drafting the contract in such a way to avoid these issues, promises can still be broken and courts may be called on to intervene. Regardless, injured parties must still make the first move. The supposedly deterred sampling artist can potentially shift the burden of enforcing this *ex ante* deterrence on the artists it is supposed to protect. Admittedly, this is a risky move on the part of the sampling artist, but it is the internal cost-benefit analysis, weighing the probability of certain risks, that determines if the action is taken. The impact of the law set forth in *Grand Upright Music* only serves as a variable in that equation. Regardless, the opportunity exists for the sampling artist to slow the payment process while still benefiting from the use.

ally accepted that it is the role of the courts to interpret and apply those laws to particular cases and disputed issues. Here, allowing the rule of law from *Grand Upright Music* to trump the compulsory license limitation on musical composition rights permits case law to overshadow well-established legislative action. The existence of the compulsory license indicates a desire on the part of society to permit some activities that would otherwise be barred by *Grand Upright Music*. It is arguable that the compulsory license itself indicates a desire to prohibit all unauthorized uses, just as was done in *Grand Upright Music*; however, *Grand Upright Music* gave artists unfettered control—no permission, no use. The compulsory license actually forces artists to allow the use of their work. In order to make that compulsion more palatable, artists were granted the compulsory license fee. *Grand Upright Music* granted no such economic benefit to artists. Actually paying artists to prevent monopoly of their work further indicates society's desire to prevent total control over creative works.

The rule from *Grand Upright Music* is also subject to anticommons issues. Requiring sampling artists to get permission before using copyrighted works puts them at the financial mercy of the artists they sample. It creates an exclusive private property right that allows the copyright owner to demand the highest price. This is only problematic for sound recordings unless the rule is applied without recognizing the compulsory license provision for musical compositions. Arguably, the sampling artist will only pay a price equal to or less than the cost of reproducing the desired sample on his or her own. While the opportunity to replay the sample should cure the anticommons problem, forcing such a result is an inefficient application of copyright protections. Artists are forced into license bargaining with every occurrence of digital sampling, regardless of the extent or nature of the use. Resources are expended in the bargaining process with only the mere possibility of a mutually beneficial outcome, since the copyright owner holds greater bargaining power and a potential for the take-it-or-leave-it attitude.

The *Grand Upright Music* decision also warrants a discussion of the effectiveness of criminal punishments. After finding Biz Markie's sampling to be infringement, the court suggested that the matter was ripe for criminal prosecution.¹¹⁷ While Judge Duffy likened Biz Markie's behavior to criminal theft, the rapper's actions constituted a classic example of using another's copyrighted work without permission. Regardless, the criminal statute cited by the court for the U.S. Attorney's reference allows for fines and even imprisonment for willful copyright infringement.¹¹⁸ As the Sixth Circuit would later articulate, all sampling is willful.¹¹⁹ It follows that if sampling is an infringement, then the infringement would also be willful. As such, the key factor is whether there was infringement. Despite that, neither of the other courts that dealt with groundbreaking digital sampling issues suggested such criminal measures. Even the court in *Bridgeport Music*, which actually did find the defendant liable for copyright infringement, failed to mention criminal penalties.

Even though criminal prosecutions were not apparently pursued in the digital sampling cases after *Grand Upright Music*, it is the efficiency of such a determination with which law-and-economics analysis is concerned. While it might seem more of a deterrent to subject sampling artists to criminal punishment, beyond civil infringement liability, the fact still remains that rappers continued to sample after *Grand Upright Music* without facing criminal prosecu-

117. *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991).

118. 17 U.S.C. § 506(a) (2000); 18 U.S.C. § 2319 (2000).

119. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004).

tion. If lawyers truly act rationally, the fact that criminal penalties are not sought by copyright plaintiffs would lead to the conclusion that it is not the most efficient course to take for an adequate remedy. If courts truly do act rationally, they would mention criminal penalties, just as Judge Duffy did, if such penalties would be a sufficient method of deterrence and redress of injury.

The key difference between *Grand Upright Music* and *Newton or Bridgeport* is that Biz Markie did not have permission to use any part of Gilbert O'Sullivan's song, whereas both defendants in the other cases had licenses for either the sound recording or the musical composition. This difference might lend itself more easily to a determination of willfulness—required in criminal copyright infringement—in the supposed infringement by the defendant. The issue still remains as to whether it truly is efficient to bring criminal charges in digital sampling cases.

From an efficiency standpoint, criminal law has the advantage of allowing those with inadequate resources or tenuous claims to let prosecution by the state proceed with their cases.¹²⁰ Criminal law does not require the individual victim to decide when and how to bring claims against the defendant.¹²¹ Generally, criminal law can also reduce the fear that results in potential victims after a particular crime has been committed, as the punishments often involve imprisonment.¹²² These considerations fall short in the context of digital sampling litigation. Typically, it is not the starving artist that brings the claim of copyright infringement for digital sampling against the monolithic, money-grubbing record company. In all three digital sampling cases discussed in this Comment, it was a record company that brought the suit against another record company (or film studio), both of which were actually grubbing for money.

As discussed in Part IV.B., *supra*, artists typically transfer their copyrights to the record companies that sign them.¹²³ As the copyright owners, the record companies must protect against infringement. Given the state of the music industry—dominated by four major record companies who often own the smaller labels—the actual copyright owner is rarely without the resources or clout to bring a claim against sampling artists and their record company. While the individual victim in digital sampling copyright cases can be seen as

120. FRIEDMAN, *supra* note 87, at 282.

121. *Id.*

122. *Id.*

123. To avoid unnecessary confusion, the subject of publishing was not discussed in Part III. However, it should be noted that songwriters also typically transfer or license their musical composition copyrights to publishers who then license the use of the compositions. PASSMAN, *supra* note 21, at 203-04. Often these publishers are just as powerful as the record companies, if they are not owned by the record companies themselves.

the original artist or creator of the work, it is most often the record company. Such an entity is capable of deciding when and how to bring digital sampling copyright infringement claims. The potential reduction in fear of crime that might result from criminal prosecution is also limited by the reality of the music industry. Potential victims are technically the record companies that own every copyright to every song. The companies would have no idea which copyrights are vulnerable to falling prey to a sampling artist.¹²⁴

Perhaps the most convincing argument against the alleged efficiency of criminal law, in the digital sampling context, is that both sides are driven by money. Sampling artists sample to make a new work that they hope will sell millions of copies; sampled artists want to be sure that if someone profits off of their original work that they benefit from some of that gain. The motivation for digital sampling litigation is royalties, not punishment. Potential criminal prosecution with fines or imprisonment or both might prevent a sampling artist from future sampling of other works, but criminal penalties offer no reimbursement to the victim. Prison time does nothing for the copyright owner but keep a potential sample licensee behind bars and out of negotiations; fines do not even go to the copyright owners. There is no incentive for sampled artists or their record companies to prevent sampling and sales through means that would prevent them from making money off those sales and the use of a sample. While criminal law might scare sampling artists *ex ante* from sampling without permission, it does not offer the most desirable penalties *ex post* for the unauthorized use of copyrighted works.

As the first case to tackle the issue, *Grand Upright Music* offers a great deal to consider in formulating an efficient solution to handling digital sampling copyright claims. Still, the case offers a very limited scope and analysis.¹²⁵ The court seemed to be on a mission to punish the defendant rather than to set out the best possible model for future courts to follow. *Grand Upright Music* offers the efficiency of a bright-line rule but opens the door for other, less-than-efficient outcomes.

2. A Diamond in the Rough

In *Newton v. Diamond*, the court established the use of a *de minimis* analysis in determining whether the unauthorized digital

124. It is inconceivable that Bruce Hornsby or his record company had any clue that a decade after writing and recording, *The Way It Is*, a rapper named 2Pac would sample it. When a song is created, there is no way for the artist or his record company to know whether or not it will ever be sampled.

125. See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 804 n.16 (6th Cir. 2005) (criticizing *Grand Upright Music* as providing no indication as to how the decision was reached).

sampling of a musical composition constituted copyright infringement. The Beastie Boys had obtained a license to use the sound recording, but not the musical composition.¹²⁶ Despite the unauthorized nature of the sample, the court held that the use of the musical composition by the Beastie Boys was not substantial enough to support a claim for copyright infringement.¹²⁷ The sampled portion was found to be neither a quantitatively or qualitatively significant portion of the entire original work.¹²⁸ There are costs and benefits to a less objective rule. As such, there are various unintended consequences to analyze along with their counterpoints.

The application of a *de minimis* standard to digital sampling cases reduces the judicial efficiency offered by the bright-line rule of *Grand Upright Music*. *De minimis* determinations hinge on a subjective “average audience” inquiry,¹²⁹ which requires various levels of analysis to determine things like substantial similarity and fragmented literal similarity. Fragmented literal similarity requires consideration of the quantitative and qualitative significance of copied portions to the original works.¹³⁰ Clearly, this kind of in-depth analysis slows down the litigation process. Each side offers its own evidence and experts as to the qualitative nature of the sampled portion and interpretations of what exactly an average audience may recognize. The entire process relies on subjective judgments rather than a default rule that says simply if there is no license, there is infringement.

Since more resources are required to reach the same desired end—resolution of digital sampling litigation—it would seem that *Newton* is a far less efficient rule than *Grand Upright Music*. Judicial efficiency definitely suffers at the hands of the *Newton* rule, but there is also a potential reduction in judicial expenditure due to such a rule. Since each case of claimed infringement would require its own individual analysis of the sample and original work to determine substantiality of copying or use, plaintiffs would be less certain of the outcome of such claims. With the *Grand Upright Music* rule, plaintiffs know that if no license was granted, they win; however, with *Newton*, they do not have that same assurance. This results in a reluctance to expend the necessary resources to bring and sufficiently present a case for copyright infringement based on the sample of another artist. Not only does judicial efficiency get a boost, but settlement becomes a much more viable alternative to litigation. Settlement allows for rational, efficient bargaining to reach an outcome. If a plaintiff is assured a victory in court, there may be no reason to

126. *Id.* at 1191.

127. *Id.* at 1192-93.

128. *Id.* at 1195.

129. *See id.* at 1193.

130. *See id.* at 1195.

consider settlement offers in an attempt to maximize the outcome with a jury verdict; however, when the chances of winning in court are unpredictable and the costs of going to court increase, plaintiffs become more amenable to out-of-court resolutions.

The *Newton* rule also raises efficiency concerns in the area of general copyright philosophy. Assuming that the rationale behind copyright law is meant to foster creativity through the protection of creative works, allowing even some unauthorized uses of copyrighted works to fall outside the parameters of the exclusive rights afforded a copyright owner weakens the effectiveness of copyright law. Artists become less inclined to produce copyrightable works for fear of having them used, without permission, for a pecuniary gain in which they will never share. The *Newton* court basically reduced copyright protection for musical compositions by making it more difficult to guard the unique manner of creating the sounds produced in the sound recording. Better explained, the plaintiff in *Newton* offered evidence that his method of playing the three notes in the sample was so unique that they should be deemed significant to the entire composition; however, the court found his method to be an element of the sound recording since the composer did not actually fix that unique method in the medium of the musical composition. Essentially, in order to have some unique method of playing an instrument protected in the musical composition, beyond the actual sound produced in the sound recording, the songwriter must write it down on the sheet music. This heightened requirement not only stifles creativity, but it is inefficient because more time must be spent by the songwriter ensuring copyright protection than actually creating copyrightable material. Such a result is in complete opposition to the purposes of copyright law.

On the other side of the above argument, it is rather inefficient to always require an artist to go through the process of obtaining a license for uses of copyrighted works that may be *de minimis*. Average audience, substantial similarity, fragmented literal similarity, quantitative significance, and qualitative significance all exist because they were determined, at some point, to be efficient, rational methods of resolving likeness disputes. The cost of ignoring established legal analytical tools, measured against the benefit of allowing songwriters to create without concern for securing protection, is too high. The implicit requirement established by *Newton* does not diminish any protections available to songwriters; it simply requires greater specificity *ex ante* if some facet of a musical composition, like uniqueness of technique, is going to be a basis for an infringement claim. It is inefficient to extend copyright protections beyond the scope of the law simply to promote the use of weak, often inapplicable, evidence in infringement actions.

The Copyright Act establishes protection for owners of copyrights in sound recordings and musical compositions. *Grand Upright Music* makes no distinctions between infringement in either types of copyright. This, again, brings the efficiency of the bright-line rule into question. The Copyright Act set out not only different types of copyrights for musical works but also grants them different protections and places different limitations on those protections. The *Newton* rule recognizes the distinctive nature of each. Granted, the Beastie Boys had a license to use the sound recording and not the musical composition, requiring an obvious focus on musical compositions. The rule in *Grand Upright Music* still does not require or even mention that distinction.¹³¹ If nothing else, the *Newton* court produced an efficient result in setting out criteria for a situation never addressed by the *Grand Upright Music* court, yet one that is very plausible given the nature of the copyright law for musical works. Clearly a difference exists between sound recordings and musical compositions. Rational decisionmaking would call for dealing with each copyright separately. In addition, any brief look at copyright infringement cases involving other media reveals the leaning of the courts toward more in-depth, multifactor analyses rather than bright-line rules.¹³² Again, if courts truly act rationally, then evidence that they prefer case-by-case analyses over bright-line rules in copyright infringement claims would point to *Newton* as promoting an efficient rule.

3. *There Is No Limit to the Madness*

In *Bridgeport Music*, the court established a bright-line rule in regard to sound recordings. No Limit Films had a license to use the musical composition, but not the sound recording.¹³³ The court held that since copyright owners have exclusive rights to derivative works and a sample is a derivative work, sampling is an exclusive right of the sound recording copyright owner.¹³⁴ The court also held that the analysis in determining infringement of musical compositions was different from that for determining infringement of sound re-

131. It is possible for the holding in *Grand Upright Music* to be read to assert that infringement is automatic if there is neither a license for the sound recording or the musical composition, or that infringement is automatic if either license is not acquired.

132. See *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Baker v. Selden*, 101 U.S. 99 (1879); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000); *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994); *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987); *United States v. Wash. Mint*, No. 9901768 JRT/FLN, 2001 WL 1640073 (D. Minn. Sept. 5, 2001); *Innovative Networks, Inc. v. Young*, 978 F. Supp. 167 (S.D.N.Y. 1997); *Anderson v. Stal-lone*, No. 87-0592 WDKGX, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989).

133. *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 393-94 (6th Cir. 2004).

134. See *id.* at 398.

cordings.¹³⁵ *Bridgeport* offers the best of both worlds from *Grand Upright Music* and *Newton*—a bright-line rule paired with recognition of the need for separate analyses. This compromise, or potential resolution, is not without its own unintended consequences and inefficiencies.

Bridgeport Music offers the efficiency of a bright-line rule to copyright infringement cases involving sound recordings. This Comment has already highlighted the efficiency virtues of bright-line rules and even the unintended circumstances resulting from their use.¹³⁶ What is important about the *Bridgeport Music* bright-line rule is that it established a bright line but recognized the need for an analysis of musical compositions like that found in *Newton*. *Bridgeport Music* basically states that, in copyright infringement cases like *Grand Upright Music*—no licenses at all—the sample is scrutinized for infringement of the musical composition based on *Newton* while infringement of the sound recording of the sound recording is automatically found. In cases like *Newton*, the *Newton* rule still applies. In cases where only the sound recording is used without permission, a finding of infringement is guaranteed.¹³⁷ This approach allows each of the different factual circumstances to be treated as unique, which is in line with the copyright law's creation of separate copyrights. While it may seem more efficient to have a single rule that applies in all music copyright circumstances, the more rational approach is to recognize obvious differences in the copyrights.

The *Bridgeport Music* court asserted that sampling was actually a “physical taking” of the sound recording.¹³⁸ That, along with the copyright law and the difficulty of applying an in-depth analysis, is offered as justification for treating unauthorized sampling of the sound recording more strictly than the musical composition.¹³⁹ Differentiating between a physical taking and an intellectual taking is not mentioned in the copyright law. In digital sampling, the use of a musical composition cannot be separated from the use of a sound recording. A sampling artist cannot use one without using the other. While a new performer could use the words from a composition without reproducing the actual sound recorded by the original performer, by definition a digital sampler lifts a portion of a song from the sound recording to be used in a new work. Thus, by using a portion of the sound recording, a digital sampler automatically uses the materials

135. *Id.* at 396.

136. *See supra* Parts IV.C.1-2.

137. This is assuming no dispute as to whether the sound recording was digitally sampled. *Bridgeport Music*, 383 F.3d at 393, 395. If there is a dispute, it must first be proven that sampling occurred.

138. *Id.* at 399.

139. *See id.*

from the musical composition. If the works are not independent of each other in the use of a digital sample, then the analysis of those samples for the purposes of determining infringement, through digital sampling, should not be independent either. While the *Bridgeport Music* court later claimed to have taken a literal, hands-off approach to interpreting copyright law, reading differentiation into the statutes inserts an unintended, judicially created standard.

Bridgeport Music holds that if pirating an entire song is infringement, then pirating a piece of a song is also infringement.¹⁴⁰ This creates a more judicially efficient rule, as it establishes a bright-line rule; however, this bright-line rule ignores the obvious differences between a part of a song and an entire work. A part of a song can go virtually undetected and be irrelevant to the overall meaning of the original from which it was sampled.¹⁴¹ That part, even when placed in a new work, may go undetected as well. Admittedly, while the detection of samples may be difficult or even impossible, that does not outweigh the benefit of protecting the original creative work of the artist or songwriter as intended by the copyright law. Regardless, as seen in *Newton*, there is a middle ground between no liability and strict liability.

What *Bridgeport Music* does offer that is of utmost importance is the decision to leave evolution of the rules to the sound recording market and those players in the music industry. The court not only stated that the ability of the music industry to easily determine appropriate licensing fees is a reason for establishing a “[g]et a license or do not sample” rule,¹⁴² it also stated that if the industry does not like this rule, then it has the ability to change it.¹⁴³ Typically, it is most efficient to allow the market for a particular good to determine both the appropriate price and the restrictions on access to the good. No doubt the music industry has the means and clout to create a sound recording licensing exchange system. However, this was not done with musical compositions; Congress created the compulsory license to keep songwriters from having monopoly-like private ownership of their works under certain circumstances. In addition, the market for samples is the reverse of a typical market. The producer of the desired good (a song) does not produce for the purpose of selling his or her product in that market (samples market); the buyer (a sampling artist) decides that a particular product (existing song), or

140. See *Bridgeport Music*, 383 F.3d *passim*.

141. It is highly unlikely that anyone besides James W. Newton and his most devoted fans—if even them—would be able to tell that the three-note, six-second sample of *Choir* used in *Pass the Mic* was actually taken from a song entitled *Choir* written by James W. Newton.

142. See *Bridgeport Music*, 383 F.3d at 398.

143. *Id.* at 401-02.

piece of it, will improve his or her product (a new work including a sample). Basically, the buyers determine the sellers, as an original seller does not even exist as a seller in the samples market until the buyer decides what he or she wants. The record company of a sampling artist may not be able to determine efficiently the price of the good (a sample) when it does not yet know what it needs, how much it needs, or how much value will actually be added by the sample. A record company on the other side does not know when its good (a sample) will be in demand or the value of a sample until the buyer is made known.

The above would lead to the conclusion that the music industry should then find a way to finesse Congress to create a similar compulsory licensing structure for sound recordings, if so desired, to avoid inefficient market determinations. The problem is that the competing forces in copyright infringement cases are almost always parties with the same interests. In fact, a record company bringing an infringement claim in one case may be defending against a claim in another. Thus, the participants in the market are in conflict with themselves because in one instance they may want one type of strict, bright-line rule in order to be sure their copyright is protected, while in another they may want to see a more in-depth analysis in the hopes of getting away with using an unauthorized sample. Each side of the argument is actually a concentrated entity, giving it the ability to influence and benefit from a particular public choice; however, neither side is a diffuse group with the inability to influence or an indifference to particular public choices. Regardless of the clout of the music industry and given the nature of the copyright infringement cases, it is irrational to wait for record companies, with fluctuating interests, to settle on the most efficient rule.

V. CONCLUSION: LAW AND ECONOMICS (RE)SOLUTION

The reality of the music industry is that digital sampling is cheaper and easier than creating replays of existing works. If the participants in the market act rationally, they will sample. Requiring permission at all times, as it stands today, is time-consuming and open to potential holdouts. The rational actor weighs the costs of creating replays and the cost of obtaining permission against the benefits of each, which will result in having the desired sample but at a higher cost than unauthorized sampling. At the same time, the rational actor also weighs the costs and benefits of just sampling without obtaining permission. If the probability of getting caught and having to pay a judgment or fine, or having to pay a license, or having to just stop using a sample altogether does not decrease the bene-

fit gained by the ease of digital sampling, artists will act rationally and continue to sample without first seeking consent.

Creative trade-offs result from either a strict enforcement of or a lenient approach to copyright law, in regard to digital sampling. Embracing rules that restrict digital sampling, thus extending greater protections to copyright owners, creates greater costs for artists creating new works. Embracing a more lenient approach to digital sampling and allowing new artists to sample at will creates greater costs for original artists seeking to protect their works. For example, the David Bowies and Queens of the music industry may be reluctant to create when the Vanilla Ices can use their creations with ease and without compensating the original artists for them; however, the 2Pacs may not create if they cannot use the works of the Bruce Hornsbys without surmounting numerous hurdles and paying potentially extortionate fees to do so. There is a cost-creativity trade-off to be made; more license-free rap equals less classic rock, but more tightly protected classic rock equals less rap. Despite any personal leanings, creativity is stifled either way, and that is contrary to the purposes of copyright law. Efficiency concerns seek a balance between the trade-offs.

Despite the hurdles that the music industry faces in establishing compulsory licensing, consideration should still be given to compulsory sampling licenses. Rather than seeking to apply a system for musical compositions to sound recordings and affecting all uses of sound recordings, Congress could simply apply a similar system to a completely separate use of musical works altogether. While this does not solve the problem of the sampling artist who chooses not to seek permission at all, the compulsory sampling license removes the guess work for those who do seek permission. They are assured of permission and, if implemented like the compulsory mechanical license, protected by the statutory rate cap. Just like the efficiency discussion of the compulsory mechanical license demonstrated, the structure of the music industry reduces anticommons problems, while the compulsory license itself reduces the commons problem.

Given the law-and-economic analysis of the three cardinal digital sampling cases above, the solution is actually a resolution of the implicit debate that exists between the cases themselves. While bright-line rules offer judicial efficiency, they inhibit creativity—contrary to the purposes of the copyright law—beyond whatever creativity they are meant to protect. Such opposition to bright-line rules would seem to eliminate any need for a *Grand Upright Music* rule of law; however, *Grand Upright Music*'s consolidation of sound recordings and musical compositions is where the analysis should begin. Consideration of sound recordings and musical compositions would seem to eliminate the beginning stages of both *Newton* and *Bridgeport Music*;

however, it is the recognition of the need for in-depth analysis in sound recordings, specifically, that provides the actual test that should be used. Relying on sound recording analysis alone would seem to eliminate the need for *Bridgeport Music*; however, *Bridgeport Music*'s acknowledgment of the need to recognize the exclusivity of each copyright ultimately gets us back in line with copyright law.

Law-and-economics analysis of digital sampling leads to the conclusion that infringement of both sound recordings and musical compositions should be evaluated based on *de minimis* determinations. Given the interdependent nature of these copyrights, a single analysis could apply to both; however, given the nature of these copyrights as distinctly owned properties, this single analysis should also be applied separately for both copyrights. This separate-but-equal analysis does not permit the possession of one license to grant the use of the other copyright. Regardless of the common type of analysis applied, each copyright of a musical work should be licensed properly to avoid judicial analysis of that particular copyright in a litigation proceeding. As such, a sampling artist that obtains a license for the musical composition, but not for the sound recording, is not automatically liable for copyright infringement and is also not off the hook. The court must still conduct the proper *de minimis* analysis to determine infringement liability for the sound recording—and vice versa.

This resolution promotes the obtaining of licenses to avoid litigation altogether, and it also promotes settlement, if unauthorized use does occur, to avoid the uncertainty of litigation. It promotes the creative purposes of copyright law by protecting the creative works of original authors yet also allowing new authors to use existing works, up to that *de minimis* level, to create new works. It allows courts to balance the cost-creativity trade-off that occurs when digital sampling is at issue. It allows the rationally acting sampling artists to do what they are going to naturally do anyway, within efficient legal parameters.